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Criminal Procedure--Discovery-Right of Prosecution to Pre-trial Discovery

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CRIMINAL PROCEDURE—DISCOVERY—RIGHT OF PROSECUTION TO PRE-TRIAL DISCOVERY—In a trial for rape, the defendant indicated an intention to rely on his alleged impotency as a defense. The trial court thereupon granted the prosecution's motion for discovery of all medical reports and X-rays relating to the defendant's present physical condition, the names and addresses of all physicians who had treated the defendant prior to trial, and the names and addresses of all physicians who had been subpoenaed to testify for the defendant. On petition by the defendant, the intermediate appellate court issued a writ of prohibition restraining the enforcement of the trial court's order.[1] On review, *held*, reversed, two judges dissenting

[1] Jones v. Superior Court, 197 Cal. App. 2d 836, 17 Cal. Rptr. 575 (1962).

in part.[2] The prosecution is entitled to discover information pertinent to evidence which the defendant intends to introduce in the nature of an exculpatory defense; such information does not fall within the scope of the defendant's privilege against self-incrimination. *Jones v. Superior Court*, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

Criminal discovery[3] was a practice foreign to the common law.[4] Its development in contemporary systems of criminal procedure has been resisted on the grounds that it would compound the already disproportionate procedural advantages enjoyed by the defendant,[5] facilitate subornation of perjury and fabrication of evidence,[6] and enable the prosecution to encroach upon the defendant's privilege against self-incrimination.[7] Nonetheless, a number of jurisdictions have overcome such objections and held that a trial court, in the exercise of its discretion, may compel the pre-trial disclosure of the prosecution's case upon proper motion by the defendant.[8]

2 The Supreme Court of California vacated the opinion of the lower court, and then issued a peremptory writ of prohibition against the broad right of discovery granted by the trial court, while at the same time directing that court to allow the discovery of that evidence requested which the defendant actually intended to use at the trial.

3 Traditionally, the term discovery has been held to comprehend oral and written depositions of parties and witnesses, interrogatories to adverse parties, notices for inspection and copying, physical and mental examinations, and demands for admissions. However, discovery would be more realistically defined as embracing all available instruments of fact ascertainment. Thus, in a criminal case, such things as the identity of witnesses, statements made at preliminary hearings, and scientific data collected by police laboratories would be proper subjects for discovery. See Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 61 (1961).

4 See, *e.g.*, King v. Holland, 4 T.R. 691, 100 Eng. Rep. 1248 (K.B. 1792). It would appear that the common-law judges were unable to conceive of the granting of discovery in a criminal case, and deemed it unnecessary to give a principled justification for denial of requests for discovery by the defendant, other than saying that there was no precedent for so doing.

5 *E.g.*, United States v. Garsson, 291 Fed. 646 (S.D.N.Y. 1923). In the course of his opinion Judge Learned Hand said: "Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure and make his defense fairly or foully, I have never been able to see." *Id.* at 649. *But see* Goldstein, *The State and the Accused: The Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152 (1960).

6 *E.g.*, State v. Tune, 13 N.J. 203, 210, 98 A.2d 881, 884 (1953). The argument that discovery leads to the facilitation of perjury appears to be, at best, questionable. The defendant who actually committed the crime charged will remain silent or rely on perjured testimony in any case. The argument also presupposes that the criminal sanctions against false testimony and tampering with witnesses are ineffective. The potential threat of perjury was also raised when discovery was introduced into civil trials, yet, despite these fears, civil litigation does not seem to have suffered from this innovation. See generally Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1154 (1951); Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 867 (1933).

7 State v. Rhodes, 81 Ohio St. 397, 424, 91 N.E. 186, 192 (1910). With the exception of two states which provide for it by statute, there is a constitutional privilege against self-incrimination in all states. See 8 WIGMORE, EVIDENCE § 2252 (McNaughten rev. 1961).

8 See, *e.g.*, State *ex rel.* Mahoney v. Superior Court, 78 Ariz. 74, 275 P.2d 887 (1954); State v. Haas, 188 Md. 63, 51 A.2d 647 (1947); Commonwealth v. Galvin, 323 Mass. 205,

On the other hand, the decisions preceding that of the court in the principal case, have, with a single exception,[9] denied the prosecution's request for discovery in the absence of appropriate statutory authorization. Such statutes as exist are almost entirely limited to situations where the defendant intends to rely on an alibi or insanity as a defense. The alibi statutes, which have been adopted in fourteen states,[10] typically preclude the defendant from raising an alibi defense in the absence of notice to the prosecution of his intention to do so within a specified time prior to the trial, accompanied by specific information regarding his whereabouts at the time of the commission of the alleged offense. The eleven states having insanity defense statutes[11] similarly require advance notice and often provide as well for the disclosure of those witnesses upon whose testimony the defendant intends to rely. Only one statute goes so far as to require each of the parties to a criminal action to provide his adversary with a list of witnesses who will be called to trial regardless of the character of the defense.[12]

80 N.E.2d 825 (1948); People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959); Hameyer v. State, 148 Neb. 798, 29 N.W.2d 458 (1947); State v. Wise, 19 N.J. 59, 115 A.2d 62 (1955);, People v. Brown, 272 App. Div. 972, 71 N.Y.S.2d 594 (1947); State v. Lack, 118 Utah 128, 221 P.2d 852 (1950); State v. Payne, 25 Wash. 2d 407, 171 P.2d 227 (1946). *But see* Walker v. People, 126 Colo. 135, 248 P.2d 287 (1952), holding that discovery should not be allowed in criminal cases in the absence of legislation. There is also a limited discovery right for the defendant in the federal courts. FED. R. CRIM. P. 16, 17(c). Under Rule 16, the evidence must be tangible objects, material to the defense, which were obtained from the defendant by seizure or process. It is usually held that the defendant may not discover his own statements under Rule 16, though defendants have fared better in this regard under Rule 17(c). See Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955); Shores v. United States, 174 F.2d 838 (8th Cir. 1949). Discovery of third party statements have been denied under the rules, however. See generally Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in Federal Courts*, 57 COLUM. L. REV. 1113 (1957); Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221 (1957).

9 McCain v. Superior Court, 184 Cal. App. 2d 813, 7 Cal. Rptr. 841 (1960), *aff'd sub nom.* People v. McCain, 200 Cal. App. 2d 825, 18 Cal. Rptr. 912 (1962). The California District Court of Appeal affirmed the trial court's granting of reciprocal motions for discovery in a criminal case. However, the affirmance was based on the fact that the defendant had made no objection to the prosecution's discovery prior to the granting of the motion, and therefore had waived the privilege. The court refused to deal with the question of whether the granting of discovery would be a violation of the privilege in the absence of waiver.

10 IND. ANN. STAT. §§ 9-1631 to -1933 (1956); IOWA CODE § 777.18 (1958); KAN. GEN. STAT. ANN. § 62-1341 (1949); MICH. COMP. LAWS §§ 768.20-.21 (1948); MINN. STAT. ANN. § 630.14 (1947); N.J. RULES 3:5-9 (1953); N.Y. CODE CRIM. PROC. § 295-1; OHIO REV. CODE ANN. § 2945.58 (Page 1954); OKLA. STAT. tit. 22, § 585 (1951); S.D. CODE § 34.2801 (1939); UTAH CODE ANN. § 77-22-17 (1953); VT. STAT. ANN. tit. 13, §§ 6561-62 (1958); WIS. STAT. § 955.07 (1959); ARIZ. R. CRIM. P. 192B.

11 ARK. STAT. ANN. § 43-1301 (1947); CAL. PEN. CODE § 1016; COLO. REV. STAT. ANN. § 39-8-1 (1953); FLA. STAT. ANN. § 909.17 (1944); IND. ANN. STAT. § 9-1701 (1956); IOWA CODE § 777.18 (1962); MICH. COMP. LAWS §§ 768.20-.21 (1948); UTAH CODE ANN. § 77-22-16 (1953); VT. STAT. ANN. tit. 13, §§ 6561-62 (1959); WASH. REV. CODE § 10.37.030 (1951); ARIZ. R. CRIM. P. 192A.

12 WASH. REV. CODE § 10.37.030 (1951). However, this statute is of questionable value, as the trial court may allow additional witnesses so long as the other side has sufficient time to interview them. If necessary, a continuance will be granted. See State v. Hoggatt, 38 Wash. 2d 932, 234 P.2d 495 (1951).

The decision of the Supreme Court of California in the principal case extends the availability of discovery procedures to the prosecution despite the absence of statutory authorization.[13] This extension constitutes a natural development of the principles which initially led the same court to grant discovery to the defendant.[14] The decision to permit the defendant to utilize discovery procedures resulted in part from the court's recognition that the primary purpose of a criminal trial is the ascertainment of facts, coupled with a willingness on the part of the court to adopt procedures thought to be conducive to the full and accurate presentation of competent evidence relevant to the factual issues in controversy, while, at the same time, assuring the defendant of a fair hearing. In compelling the disclosure of relevant information in the possession of the prosecution, the court observed that, with the exception of those instances in which effective law enforcement might necessitate secrecy, the state had no interest in securing the conviction of an accused because of the defense's inability either to cross-examine the prosecution's witnesses effectively, or to anticipate the nature of the prosecution's case so as to prepare material rebuttal evidence.[15] Thus, in order to obtain a conviction, the prosecution was forced to rely upon the persuasiveness of its evidence rather than upon the tactical advantages which might have been gained from concealment and surprise. Because of the importance of providing the defendant with an effective means of fact ascertainment, the court was willing to risk the possibility that information procured through discovery techniques might be utilized to fabricate a defense out of perjured testimony. The court, by its decision in the principal case, recognized that these principles have correlative applicability to the discovery of evidence in the defendant's possession. Insofar as the privilege against self-incrimination and other privileges con-

13 The only statute dealing with any type of discovery in California requires the defendant to plead insanity or double jeopardy specially. CAL. PEN. CODE §§ 1016-17, 1026. The California legislature rejected an alibi statute [Assembly Bill 484 (1961)], with the opposition to the bill based on the fear that the government might intimidate witnesses. See generally Waddington, *Criminal Discovery and the Alibi Defense*, 37 L.A.B. BULL. 7, 26 (1961).

14 In California, the defendant has been permitted to use discovery to obtain access to transcripts, notes and recordings of his conversations with the police; police records; written confessions; written statements made by the prosecution's witnesses; and samples taken from the victim's body, together with autopsy reports. For a summary of the California decisions, see People v. Norman, 177 Cal. App. 2d 59, 1 Cal. Rptr. 699 (1960). The granting of criminal discovery to the defendant, while still theoretically in the discretion of the trial court in California, is given virtually as a matter of course. See generally Louisell, *supra* note 3, at 82. *But cf.* People v. Cooper, 53 Cal. 2d 755, 349 P.2d 964, 3 Cal. Rptr. 148 (1960), in which the trial court's denial of the defendant's blanket request for all written statements in the possession of the prosecution was upheld on the ground that the defendant must have a better reason for requesting discovery than a mere desire to benefit from the entirety of the information assembled by the prosecution. See also People v. Norman, *supra*, upholding the denial by the trial court of the defendant's discovery motion made after an adverse verdict on the ground that the defendant had waived his privilege of discovery. See also cases collected in Louisell, *supra* note 3, at 81 n.117.

15 See People v. Riser, 47 Cal. 2d 566, 586, 305 P.2d 1, 13 (1956).

ferred by law are inapplicable, the defendant is held to have no legitimate interest in denying the prosecution access to information in his possession which might, if disclosed, illuminate the factual issues in controversy and thereby facilitate their accurate, orderly, and complete resolution.[16] In order to avoid a possible conflict with the defendant's privilege against self-incrimination, and because the facts of the case necessitated nothing more, the court allowed discovery of only that information which pertains to evidence which the defendant intends to produce at trial.[17]

The major difficulty presented by this decision lies in determining the extent to which the privilege against self-incrimination limits the availability of discovery to the prosecution. The California Supreme Court has all but final authority to define the scope of protection afforded by the privilege, since it is conferred by the state constitution.[18] The dissent in the principal case would construe the privilege as conferring an absolute right on the defendant to withhold disclosure of any information in his possession until such time as he might deem disclosure necessary or desirable.[19] Such a construction would give the privilege an unnecessarily double effect. It would not only afford the defendant a safeguard against the compulsory disclosure of incriminating evidence, but would also provide him with a tactical device that would enable him to withhold the disclosure of non-incriminatory evidence which he intends to introduce at the trial until the element of surprise and the unpreparedness of the prosecution could be fully exploited.[20] The majority, on the other hand, while conceding the propriety of according the defendant protection against the compulsory disclosure of incriminating evidence, would deny the use of the privilege as a tactical device which would enable the defendant to employ the element of surprise at the trial. Because the information pertaining to the evidence which the defendant actually intends to produce at trial is hardly likely to be of an incriminatory nature, such information was held not to be protected from discovery by the privilege. Thus, the decision goes no further than to require disclosure of certain evidence at a point in time earlier than was theretofore necessary.[21] Consequently, the

16 Principal case at 920, 22 Cal. Rptr. at 880.

17 *Id.* at 922, 22 Cal. Rptr. at 882.

18 CAL. CONST. art I, § 13. The states have great leeway in defining the scope of their own privilege against self-incrimination. Cohen v. Hurley, 366 U.S. 117, 125 (1961). The fifth amendment to the United States Constitution has no application to state criminal proceedings. See Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908).

19 Principal case at 923, 22 Cal. Rptr. at 883.

20 The element of surprise in criminal trials is the bane of prosecutors. It is the problem of the surprise witness who appears at or near the close of the trial to give testimony, often perjured, favorable to the defense, and thus creating a "reasonable doubt" as to defendant's guilt, that the alibi statutes have attempted to rectify. See statutes cited in note 10 *supra*.

21 This argument has been used to uphold the alibi statutes against the challenge based on the privilege against self-incrimination. See State v. Smetana, 131 Ohio St. 329, 2 N.E.2d 778 (1936); People v. Shulenberg, 279 App. Div. 115, 112 N.Y.S.2d 374 (Sup. Ct.

majority's decision would appear to preserve the integrity of the privilege as a safeguard while, at the same time, facilitating the full and accurate presentation of evidence relevant to the resolution of the factual issues in controversy. In addition, the decision tends to rectify the procedural imbalance created by the court's earlier decisions granting only the requests made for discovery by the defendant.[22]

Although the majority is silent on the point, the dissent in the principal case suggests that the majority's holding limits the availability of discovery procedures to the prosecution to those instances in which the defendant intends to raise affirmative defenses.[23] Such a limitation would be unfortunate, as it would frustrate the development of any system whereby discovery procedures would be independently available to both parties in a criminal trial.[24] While the availability of discovery to the prosecution cannot be unlimited, any limitations placed upon it should be based on the existence of the defendant's privilege against self-incrimination or any other privileges conferred by law, rather than upon an attempt to categorize certain information as discoverable because it relates to the character of the defense. Rather, the rule should more appropriately be that the defendant must give notice of any and all defenses he intends to raise at trial and allow the prosecution discovery of information pertaining to such

1952); State v. Kopacka, 261 Wis. 70, 51 N.W.2d 495 (1952). See also State v. Osburn, 171 Kan. 330, 232 P.2d 451 (1951); People v. Longaria, 333 Mich. 696, 53 N.W.2d 685 (1952); State v. Payne, 104 Ohio App. 410, 149 N.E.2d 583 (1957), each upholding the trial court's refusal to admit alibi testimony after the defendant had failed to comply with the statute. See generally Dean, *Advance Specifications of Defense in Criminal Cases*, 20 A.B.A.J. 435 (1934).

22 An alternative solution to this problem, possibly more palatable to other courts, would be to adopt the practice whereby trial courts in their discretion would withhold discovery from any defendant unwilling to grant a reciprocal privilege to the prosecution. See Goldstein, *supra* note 5, at 1198. The trial courts may condition their grant of discovery to the defendant in any way they see fit, as discovery is not required by due process in a criminal trial. Cicenia v. LaGay, 357 U.S. 504, 510-11 (1958). Since the defendant's voluntary acquiescence would operate as a waiver of his privilege against self-incrimination, conflict on that point would be avoided. *Cf.* McCain v. Superior Court, 184 Cal. App. 2d 813, 7 Cal. Rptr. 841 (1960), *aff'd sub nom.* People v. McCain, 200 Cal. App. 2d 825, 18 Cal. Rptr. 912 (1962); 8 WIGMORE, *op. cit. supra* note 7, § 2275. No procedural advantages would be enjoyed by either party, because discovery would be granted, if at all, only on a reciprocal basis. However, in those instances where the defendant would not choose to request discovery, the court's policy of facilitating fact ascertainment through pre-trial disclosure of information pertinent to the resolution of factual issues would be frustrated.

23 Principal case at 925, 22 Cal. Rptr. at 885. The dissent points out that there is great controversy over what actually constitutes an affirmative defense. It would therefore be unsatisfactory to allow the availability of discovery to the prosecution to be controlled by the existence or non-existence of an affirmative defense in the case. See also ILL. CRIM. CODE § 3-2 (1961); MODEL PENAL CODE § 1.13 & comment, at 108 (Tent. Draft. No. 4, 1955).

24 A system of independent discovery is to be distinguished from one of reciprocal discovery. The former permits either side to avail itself of discovery procedures upon its own motion. Reciprocal discovery allows discovery to the prosecution only if the defendant first requests it for himself. See note 22 *supra*.

defenses. In order to insure compliance with this rule, the defendant should be precluded from raising any defenses of which he failed to give notice.[25] Two limitations to this rule should be recognized. First, the defendant should be allowed to defeat the discovery motion by the prosecution by invoking the privilege against self-incrimination, if he first satisfies the court that the information which the prosecution seeks to discover, though pertinent to his defense, would tend to incriminate him. The prosecution should also be prevented from discovering such items as memoranda, plans for presentation, notes of interviews with witnesses, and other items which go to make up the file of the defendant's counsel.[26] The purpose of the latter limitation is to prevent the prosecution from using the fruits of the defense counsel's research and analysis in preparing his case. It would be questionable policy to relieve the prosecution of the duty of ascertaining for itself the relevance of various statutes and previous judicial decisions to the cases it brings to trial. Such a rule as that proposed, coupled with the widespread availability of discovery to the defendant in many states, would further the interest of society as a whole in having facts ascertained in all criminal trials.

The modern law of criminal procedure reflects the interest of society in protecting the individual from the power of the state. The many safeguards afforded the defendant are thought to reduce the possibility that an innocent man will be sent to his death or to prison through involvement with the judicial process. However, vindication of the innocent, although certainly one legitimate objective of the criminal law, must be balanced against the equally important objective of punishing the guilty. Overemphasis on the first-named objective could result in a situation whereby the verdict in a criminal trial will depend not so much on the justice of the defendant's cause as on the skill of his counsel in employing the tactical devices placed in his possession by contemporary procedures. These procedures are the product of a system of law which was based on the traditional concept that litigious conflict was conducive to the ascertainment of truth. Discovery has been resisted by those who fear that the introduction of discovery procedures would undermine the adversary system. Resistance on this ground is unwarranted, as the availability of such procedures would enhance the ability of counsel to contest the factual issues in controversy since they would be better acquainted with the information pertaining

[25] The defendant should be allowed to raise any defense which comes to light during the trial of which he was unaware before trial, even though he has failed to give notice of it for that reason. In such cases, a two or three-day continuance could be granted in order that the prosecution may discover information pertaining to the new defense. Presumably such a continuance would not encroach on the defendant's right to a speedy trial.

[26] Such a limitation is imposed upon discovery procedures in civil litigation, and is based on the attorney-client privilege. The law is not settled as to exactly what items should remain non-discoverable under this rule. See generally MCCORMICK, EVIDENCE § 100 (1954).

to those issues. In addition, discovery procedures would serve to eradicate the devices of surprise and concealment which are probably the most undesirable by-products of the adversary system.

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